## TOPICAL INDEX


| | Page |
|---|---|
| Petitioner prays for writ of certiorari | 1 |
| Opinions Below | 2 |
| Grounds on which the jurisdiction of this Court is invoked | 2 |
| Questions presented for review | 2 |
| Argument | 5 |
| Conclusion | 6 |
| Appendix Opinion of the Court Below | |


## TABLE OF AUTHORITIES CITED

### Cases


| | |
|---|---|
| Glasser v. United States, 315 U.S. 60 | 4, 5 |
| Lollar v. United States, 376 Fed. 243 | 6 |


### Statutes


| | |
|---|---|
| United States Constitution | |
| Fifth Amendment | 5 |
| Sixth Amendment | 5 |
| 28 U.S.C. § 2101(c) | 2 |

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

---

No. .....

---

LOUIS HENRY COX,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

---

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

---

Petitioner, Louis Henry Cox, respectfully prays for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment denying relief and affirming a judgment of the United States District Court for the Central District of California.

## OPINIONS BELOW

No opinion was written by the trial court.

The opinion of the court below is attached hereto as an appendix and made a part hereof. The opinion is as yet not reported.[1]

## GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

1. The date of the judgment sought to be reviewed is February 19, 1971, and the time of its entry is the same.

2. A petition for rehearing was filed by petitioner, and the same was denied by the Court of Appeals on March 16, 1971.

A petition for the purpose of withholding the mandate to the District Court was duly filed, and no judgment or mandate has as yet come forth to the District Court.

The statutory provisions believed to confer on this Court jurisdiction to review the judgment in question are contained in 28 U.S.C. § 2101(c).

## QUESTIONS PRESENTED FOR REVIEW

Petitioner, appellant below, contended that he was denied the effective assistance of counsel for the following reasons: (a) failure to use pretrial discovery, (b) waiving the

---

1. The record consists of the Clerk's Transcript in the District Court and in the court below in one volume (C.T.), the Reporter's Transcript in the District Court (R.T.), and the opinion of the court below, which is appended hereto.

jury, (c) stipulating that the package in question contained heroin, (d) failure to object to a telephone conversation, (e) failure to call Herbert Cox as a witness, and (f) conflict of interest on the part of petitioner's attorney which prevented said attorney from properly defending petitioner.

The learned Court of Appeals states in its opinion:

> "We have read the record and, with the exception of the last contention, hold that the actions of the attorney might be viewed as poor trial tactics, but that such actions, even if 'poor' or 'careless', did not rise to the dignity of plain or constitutional error. Certainly there is nothing in the record which would justify us in holding that the performance of appellant's attorney was '. . . so incompetent as to make the trial "a farce or a mockery of justice" . . .', which appellant must show in order to prevail. (Citing cases.)" (Appendix pp. 2 and 3.)
>
> "Appellant's charge that he was denied effective assistance of counsel due to a conflict of interest is based on the fact that his lawyer also represented appellant's brother, Herbert, in another narcotics case at or about the time of appellant's trial. Appellant's contention is without merit. The record indicates that Herbert was in the courtroom during the trial, but was not called to testify for the defense. Although Cox's appellate counsel rather darkly suggests that there may have been a hidden 'deal' between the United States Attorney and appellant's trial attorney not to call Herbert, we find nothing before us which

> even remotely suggests such unprofessional conduct. On this issue, we find ourselves in much the same position as was another panel of this court in *United States v. Mos*, ..... F.2d ..... (9th Cir., December 23, 1970), where the same type of charge was made under similar circumstances and was rejected because of the factual inadequacy of the record. From all we can gather from the record in the instant case, the failure to call Herbert might well have been part of the defense strategy of appellant's trial counsel. Moreover, there is nothing which would indicate that appellant even suggested that his brother be summoned. On these facts, we feel compelled to emphasize the basic right and implied authority of counsel to conduct the defense in such manner as he sees fit. (Citing cases.)" (Appendix p. 3.)

With this we cannot agree, for it appears that there was a strong similarity between the defendant-petitioner and his brother Herbert. Surely, Herbert being in court, he should have been called as a witness.

We respectfully direct the Court's attention to *Glasser v. United States*, 315 U.S. 60, 75. In that case, a Mr. Stewart was appointed to represent Mr. Glasser and was also representing another defendant. The court refers to objections by attorney Stewart and says his effort was established as "indicated by Stewart's struggle to serve two masters." Surely, where there was a question of identity, any proof that would reflect upon that issue should have been offered by defense counsel. The brother Herbert sat in the courtroom

and he was not called to testify.

The right to counsel of one's choosing is so basic that we feel it requires no citation to authority; analogous thereto and inseparable therefrom is the right to have the undivided attention of that counsel. As was said in *Glasser v. United States, supra,* 315 U.S. at 75-76:

> "The right to have the assistance of counsel is too fundamental to all courts to indulge in nice calculations as to the amount of prejudice resulting from its denial."

We respectfully contend that the representation afforded to this petitioner at the trial level cannot be reduced to a mere question of trial strategy; it is more than that. What could have been more important than showing the possibility that brother Herbert was the man suspected and not this petitioner?

## ARGUMENT

We have already referred to the right of petitioner Cox to the undivided attention of counsel, to the end that he receive effective aid of counsel as guaranteed by the Fifth and Sixth Amendments to the United States Constitution. (*Glasser v. United States, supra.*) Additionally, it has been said:

> "Even as we have held that the right to the assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing, and the failure of that court to make an effective appointment of counsel, may so offend our con-

cept of the basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth Amendment, *Powell v. Alabama,* 287 U.S. 45, so are we clear that the 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired.

"To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights."

*Lollar v. United States,* 376 Fed. 243, 246.

This case does not permit the dilution of this basic right by the excuse that failure to call the brother as a witness was trial strategy. The court should have had this witness before it, to measure his testimony by his demeanor, his candor or lack of it, his interest or bias.

## CONCLUSION

We respectfully pray for a hearing before this Court, to the end that justice be done.

Respectfully submitted,

RUSSELL E. PARSONS
JOHN H. MARSHALL

*Attorneys for Petitioner*

## APPENDIX

---

## OPINION OF THE COURT BELOW

In the United States Court of Appeals, for the Ninth Circuit.

No. 25,765.

UNITED STATES OF AMERICA, Appellee, v. LOUIS HENRY COX, Appellant.

[February 19, 1971]

Appeal from the United States District Court
Central District of California

---

Before: MERRILL, CARTER and KILKENNY, Circuit Judges.

KILKENNY, Circuit Judge:

Appellant was indicted for three offenses. Count One charged him with knowingly and unlawfully receiving, concealing and facilitating the concealment and transportation of heroin, a narcotic drug, in violation of 21 U.S.C. § 174. Count Two charged him with knowingly and unlawfully selling and facilitating the sale of the same drug, which appellant knew had been illegally imported into the United States, in violation of 21 U.S.C. § 174. Count Three charged him with knowingly and unlawfully selling, bartering and giving away the same heroin without obtaining from the purchaser a written order on a form issued for that purpose, in violation of 26 U.S.C. § 4705(a). After waiving a jury, appellant was tried by the court, convicted on all three counts, and sentenced to concurrent terms of five years imprisonment on each count.

*FACTS*

Only two witnesses gave testimony at the trial. For the prosecution, a government narcotics agent testified that

he met the appellant and purchased 10.360 grams of heroin from him for $175.00, and that appellant never asked him for a written order form. Appellant, testifying in his own defense, acknowledged that he had met the agent, but denied selling the heroin to him or making any arrangements with him for such a sale, though he admitted discussing a possible sale of cocaine over the telephone. Appellant insisted that the agent must have sold the heroin to appellant's brother, Herbert, who strongly resembled appellant. The agent, however, testified that he was positive that appellant was the one who had sold him the drug. In deciding the case, the trial judge stated that he believed the agent's account of what transpired was more credible than the story offered by appellant.

*CONTENTIONS*

(1) Appellant contends that he was denied the effective assistance of counsel for the following reasons: (a) failure to use pretrial discovery, (b) waiving the jury, (c) stipulating that the package sold contained heroin, (d) failure to object to a telephone conversation, (e) failure to call Herbert Cox as a witness, and (f) conflict of interest on the part of appellant's attorney which prevented him from properly defending appellant.

We have read the record and, with the exception of the last contention, hold that the actions of the attorney might be viewed as poor trial tactics, but that such actions, even if "poor" or "careless", did not rise to the dignity of plain or constitutional error. Certainly there is nothing in the record which would justify us in holding that the performance of appellant's attorney was ". . . so incompetent as to make the trial 'a farce or a mockery of justice' . . . ", which

appellant must show in order to prevail. *Musgrove v. Eyman*, ..... F.2d ..... (9th Cir., January 5, 1971); *Kruchten v. Eyman*, 406 F.2d 304, 312 (9th Cir. 1969).

Appellant's charge that he was denied effective assistance of counsel due to a conflict of interest is based on the fact that his lawyer also represented appellant's brother, Herbert, in another narcotics case at or about the time of appellant's trial. Appellant's contention is without merit. The record indicates that Herbert was in the courtroom during the trial, but was not called to testify for the defense. Although Cox's appellate counsel rather darkly suggests that there may have been a hidden "deal" between the United States Attorney and appellant's trial attorney not to call Herbert, we find nothing before us which even remotely suggests such unprofessional conduct. On this issue, we find ourselves in much the same position as was another panel of this court in *United States v. Mos*, ..... F.2d ..... (9th Cir., December 23, 1970), where the same type of charge was made under similar circumstances and was rejected because of the factual inadequacy of the record. From all we can gather from the record in the instant case, the failure to call Herbert might well have been part of the defense strategy of appellant's trial counsel. Moreover, there is nothing which would indicate that appellant even suggested that his brother be summoned. On these facts, we feel compelled to emphasize the basic right and implied authority of counsel to conduct the defense in such manner as he sees fit. *Eaton v. United States*, ..... F.2d ..... (9th Cir., January 25, 1971); *Watkins v. Nelson*, 430 F.2d 1311 (9th Cir. 1970); *United States v. Meek*, 388 F.2d 936 (7th Cir. 1968), *cert. denied* 391 U.S. 951 (1968). We would be much more sympathetic

to appellant's claim if, as was the case in *Glasser v. United States,* 315 U.S. 60, 75 (1942), the appellant had specifically asked for the "undivided assistance" of counsel and been refused. Here, there was no such request.

(2) Next, appellant urges that he was deprived of the presumption of innocence by reason of the trial judge's comments, at the time of decision, on the credibility of the witnesses. A judge not only has the right, but is constantly encouraged to state the reasons for his decision. Here, the judge said that the government agent had "no reason to lie" and then gave reasons why he did not believe appellant's version of what occurred. Needless to say, the presumption of innocence may completely disappear in the light of the totality of existing facts.

(3) Finally, appellant argues that there was insufficient evidence to sustain the conviction on Count One. The government agent testified that appellant had possession of the heroin. Under the provisions of 21 U.S.C. § 174, the unexplained possession of the drug permits a statutory inference of guilt by the trier of the facts. *Turner v. United States,* 396 U.S. 398, 405-406 (1970); *Verdugo v. United States,* 402 F.2d 599 (9th Cir. 1968). Moreover, since the sentences on all three counts are to run concurrently and appellant does not challenge the sufficiency of the evidence on Counts Two and Three, the question of whether there was sufficient evidence to sustain the conviction on Count One is academic. *United States v. Tamayo,* 427 F.2d 1072 (9th Cir. 1970); *Jordan v. United States,* 416 F.2d 338 (9th Cir. 1969), *cert. denied* 397 U.S. 920 (1970), *rehearing denied* 397 U.S. 1018 (1970).

FINDING NO ERROR, WE AFFIRM.

STATE OF CALIFORNIA )
) ss.
COUNTY OF ORANGE )

I, the undersigned,say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 322 Main Street, Huntington Beach, California 92648, that on MAY 28 1971, I served the within PETITION FOR WRIT OF CERTIORARI (Cox v. United States) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

UNITED STATES ATTORNEY
FOR THE CENTRAL DISTRICT OF CALIFORNIA
12TH FLOOR, U. S. COURTHOUSE
LOS ANGELES, CALIFORNIA 90012 [3 copies]

SOLICITOR GENERAL OF THE UNITED STATES
WASHINGTON, D. C. 20543 [3 copies]

I declare under penalty of perjury that the foregoing is true and correct.

Executed on MAY 28TH 1971, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

41 COPIES: Clerk, Supreme Court of the United States
Washington, D. C. 20543

Dean-Standefer Co., 322 Main St., Huntington Beach, Ca.
(714) 536-7161

# In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-257

LOUIS HENRY COX, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In a jury-waived trial in the United States District Court for the Central District of California, petitioner was convicted on three counts of an indictment charging an illegal sale of heroin in violation of 21 U.S.C. 174 and 26 U.S.C. 4705(a) (Tr. 4–5, 35).[1] On November 3, 1969, he was sentenced to imprisonment for five years on each count, the sentences to run concurrently. (Tr. 38, 40.) The court of appeals affirmed the conviction on February 19, 1971 (Pet. App.) and a petition for rehearing was denied on March 16, 1971. The petition for a writ of certiorari, filed on June 8, 1971, is out of time under Rule 22(2) of the Rules of

[1] "Tr." refers to the transcript of the trial testimony, a copy of which we are lodging with the Clerk of this Court.

this Court.[2] In any event, the petition presents no issue warranting review by this Court.

Federal narcotics agent Taylor, the sole prosecution witness, testified that on May 1, 1969, he went to an apartment in Los Angeles where he met petitioner. Taylor told petitioner that he was looking for Herbert or Willie Cox (petitioner's brothers) in order to purchase some heroin. Petitioner said that they were not there, but that he perhaps could take care of Taylor, if he would get in touch with him on the following day (Tr. 7–8). On May 2, 1969, Taylor telephoned the apartment and asked to speak to Louis. Petitioner, who answered the phone, identified himself as Louis. Taylor said he was ready to purchase one-half ounce of heroin. Petitioner said that the heroin would be ready upon Taylor's arrival at the apartment, and that, in addition, he had a very good grade of cocaine he would like to sell for $725 per ounce (Tr. 8). When Taylor arrived at the front door, he was met by petitioner and Herbert Cox, who instructed Taylor to go inside and be seated. A few minutes later, petitioner came into the room and handed Taylor an aluminum foil container containing heroin, for which Taylor paid petitioner $175 (Tr. 9–10, 16–17).

Petitioner testified that he had not sold heroin to Taylor on May 2 or at any other time (Tr. 19, 20) and that Taylor must have mistaken him for one of his brothers (Tr. 28): Recalled as a rebuttal witness, Taylor testified that he was sure his May 2nd purchase of narcotics was from petitioner, since he knew both

[2] Petitioner's counsel has filed an affidavit in this Court containing a motion for relief from default.

Herbert and Willie and it was not either one of them (Tr. 31). In accepting Taylor's testimony as credible, the trial court stated, "* * * I have grave doubt that Mr. Taylor would confuse Herbert and the defendant, particularly since Herbert was there at the very time that the narcotics was purchased, and he also knows Willie, and he was convinced it wasn't Willie" (Tr. 34).

Petitioner now contends that he was denied the effective assistance of counsel in that his trial counsel also represented petitioner's brother, Herbert Cox, in another narcotics case and, because of this alleged conflict of interest, failed to call Herbert as a defense witness on the issue of identification. There is nothing in the record, however, to indicate that Herbert Cox would have testified that he, rather than petitioner, sold the heroin to Taylor. On cross-examination of Taylor, petitioner's counsel had elicited the fact that petitioner and Herbert looked alike and that Herbert was then in the courtroom (Tr. 12–13). Counsel could well have decided, as a matter of trial strategy, that it would have served no useful purpose to call Herbert thereafter as a witness.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

JULY 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971